Western New England Law Review

Volume 41 *41 (2019)*
Issue 2

Article 1

2019

MILITARY LAW—REDEFINING CORROBORATION: THE HISTORY, INTENT, AND EFFECT OF CONGRESS'S DIRECTION TO CHANGE HOW CONFESSIONS ARE CORROBORATED IN MILITARY COURTS

Seth M. Engel

WESTERN NEW ENGLAND LAW REVIEW

Volume 41 2019 Issue 2

MILITARY LAW—REDEFINING CORROBORATION: THE HISTORY, INTENT, AND EFFECT OF CONGRESS'S DIRECTION TO CHANGE HOW CONFESSIONS ARE CORROBORATED IN MILITARY COURTS

Captain Seth M. Engel[*]

Since at least the seventeenth century, courts have required that confessions or admissions be corroborated by independent evidence to be admissible at trial. After the United States Court of Appeals for the Armed Forces decided United States v. Adams*, a case interpreting the military's version of the corroboration rule, Congress quickly took action in response. Within months, Congress passed a law directing the President to rewrite the military's corroboration rule, and a new rule was subsequently promulgated. Why was Congress so intent on overruling a military appellate court's interpretation of an ancient and obscure rule of evidence? What was wrong with the court's former corroboration rule? What does the new rule do differently? This Article seeks to answer those questions. This Article concludes that the impetus for amending the rule was an effort to control the impact that the court's interpretation of the corroboration rule would have on sexual assault prosecutions. Further, after analyzing the old and new corroboration rules, this Article concludes that the new rule, as promulgated by the President, has the effect of overturning* Adams *and likely returns the corroboration rule back to what it had been prior to the* Adams *decision.*

[*] Captain Seth M. Engel is a Judge Advocate in the United States Marine Corps. Captain Engel is a graduate of the United States Army Judge Advocate General's School, LLM., 2017; Cornell Law School, J.D., 2011; and Purdue University, B.A., 2008. The views and opinions expressed in this Article are those of the author and do not reflect the official policy or position of the U.S. Marine Corps, Department of Defense, or the U.S. Government.

INTRODUCTION

In April 2015, the United States Court of Appeals for the Armed Forces (C.A.A.F.) decided *United States v. Adams*.[1] Interpreting and applying Military Rule of Evidence (MRE) 304(c) was the sole issue in the case—the rule requiring that an accused's confession or admission be corroborated in order for it to be admissible at trial in military courts.[2] Although one would expect a decision regarding a rule that has been referred to as a "dusty doctrine of criminal law" to go largely unnoticed,[3] it turned out not to be the case. Only three weeks after *Adams* was decided, legislation was introduced in the United States Senate to rewrite the military's corroboration requirement in an effort to overturn *Adams*.[4] A version of that legislation was ultimately included in the National Defense Authorization Act for Fiscal Year 2016 (FY16 NDAA), directing the President to rewrite the military's corroboration rule to conform with federal practice.[5] Just over a year after the decision in *Adams*, President Barack Obama promulgated a new MRE 304(c) corroboration rule.[6]

Why did a military appellate court's interpretation of the military's version of an obscure rule of evidence garner so much attention from Congress? What was the old rule and how did *Adams* interpret it? What is different about the new corroboration rule, and how is a confession corroborated under the new rule? Finally, is the new rule consistent with

---

1. United States v. Adams, 74 M.J. 137, 141 (C.A.A.F. 2015) (reversing the admission of part of the accused's confession where that part of the confession was not corroborated by other evidence), *superseded by rule as stated in* United States v. Berry, No. ACM S32351, 2015 WL 13122297 (A.F. Ct. Crim. App. Feb. 9, 2017); *see* Exec. Order No. 13,730, 81 Fed. Reg. 33,331, 33,350 (May 20, 2016) [hereinafter Order 13,730].

2. *See Adams*, 74 M.J. at 139–41.

3. United States v. Brown, 617 F.3d 857, 860 (6th Cir. 2010).

4. *See* National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th Cong. § 546 (as reported by S. Comm. on Armed Servs., May 19, 2015).

5. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015). The original version of the bill directed that four substantive changes be made to the corroboration rule, whereas the bill that was passed directed that the rule be rewritten to conform with the corroboration rule as used in federal district courts without explaining what the federal practice is, or what changes would be necessary for the rule to conform with federal practice. *Compare* National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th Cong. § 546 (as reported by S. Comm. on Armed Servs., May 19, 2015), *with* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015).

6. *See* Order 13,730, *supra* note 1, at 33,350–51 (amending MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. 304(g) (2012) [hereinafter 2012 MCM]). The text of MRE 304(c) prior to its amendment, after the amendment, and a line-in/line-out version of MRE 304(c) are contained in the appendices. *See infra* app. A (providing the text of MRE 304(c) promulgated on May 20, 2016); app. B (providing the text of MRE 304(c) prior to May 20, 2016); app. C (showing the line-in/line-out version of changes made to MRE 304(c)).

Congress's intent? This Article seeks to answer those questions and concludes that the reason Congress acted so quickly in overruling *Adams* was due to the impact that its interpretation of the rule would have had on the ability of the military to prosecute servicemembers accused of sexual assault. Namely, after *Adams*, there was a risk that the military would not be able to prosecute servicemembers in some sexual assault cases, even in instances where there was a confession.[7]

The old corroboration rule was easy to understand superficially but notoriously difficult to apply.[8] Practitioners, courts, and commentators have long struggled to understand the rule and apply it consistently.[9] The text of the rule was at odds with how many courts actually applied it. In *Adams*, the C.A.A.F. sought to provide clarity and strictly adhere to the text of the rule.[10] The new rule substantially changes the text of the rule and upends the progress made in the old corroboration rule's interpretation. After analyzing the new rule, this Article concludes, in practical effect, the new corroboration rule changes the corroboration analysis back to essentially the same analysis that military courts had conducted prior to the *Adams* decision. Whether this interpretation of the new rule is what Congress intended is not entirely clear. Congress clearly intended the new rule to overturn the holding in *Adams*; however, it is not clear if the intent to make the new rule conform with federal practice also evinced an intent for additional changes to the rule.

---

7. *See, e.g.*, United States v. Latour, 75 M.J. 723, 732–33 (N-M. Ct. Crim. App. 2016) (applying the corroboration rule after *Adams* in a sexual assault case and upholding the trial court's suppression of the accused's admission to penetration where the act of penetration was not corroborated).

8. *See Brown*, 617 F.3d at 862 ("It is one thing to state the corroboration rule (and the purposes it serves) and another to apply it."); Major Russell L. Miller, *Wrestling with MRE 304(G): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 47 (2003) ("[W]hile the rule seems straightforward, its application to a particular set of facts in a case may be difficult."); Colonel J. Wesley Moore, *The Corroboration Quandary: A Historical Overview of the Interpretation of MRE 304(g)*, 67 A.F. L. REV. 89, 89 (2011). Moore reasons that although one might suppose that the rule is "well-settled and easily-applied," it is not the case. *Id.* at 91. "[O]ne facing a corroboration issue residing near the lower limit faces a task in many respects no less daunting than it was immediately after adoption of the *Opper* rule." *Id.* at 130.

9. *See* Miller, *supra* note 8; Moore, *supra* note 8, at 91, 130; Zeigel W. Neff, *Corroboration of a Confession in the Military*, 16 JAG J. 19, 19 (1962) ("The early cases handed down by the Court of Military Appeals were somewhat conflicting, covering a wide range from a strict rule of corroboration to practically no requirement therefor at all. . . . [C]orroboration is often not well understood by those practicing military law . . . ."); Major James B. Thwing, *Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases, Part II*, 6 ARMY LAW. 46, 58 (June 1985) ("Many trial counsel and military judges are becoming increasingly confused about the meaning of Military Rule of Evidence 304(g), which governs the corroboration of confessions and admissions.").

10. United States v. Adams, 74 M.J. 137, 139–41 (C.A.A.F. 2015).

Part I of this Article discusses the origins, purpose, and development of the corroboration rule. Part II discusses the development of the rule in military courts up until the *Adams* decision. Part III contextualizes the development of the new MRE 304(c), explains what has changed in the text of the rule, and discusses resources for interpreting it. Part IV analyzes the new corroboration rule to determine what it means and how the rule has changed. Finally, Part V concludes with a review of the new corroboration rule and whether it meets Congress's intent in directing the rule.

I. ORIGIN, PURPOSE, AND DEVELOPMENT OF THE CORROBORATION RULE

This section begins by describing the evolution of the corroboration rule from its origins as the *corpus delicti* rule in English common law to its broad acceptance in American criminal jurisprudence. Next, this section details the varied rationales for having a requirement that confessions and admissions be corroborated by independent evidence. Finally, this section will discuss the development of the Modern corroboration rule by the Supreme Court.

A. *Corpus Delicti*

The modern corroboration rule traces its origin to the *corpus delicti* rule, which was a creation of seventeenth century English common law. The rule required independent evidence, apart from a confession, that a crime had actually occurred in order to convict someone who had confessed to the crime.[11] The traditional example used to explain the origins of the *corpus delicti* rule is *Perry's Case*, decided in 1660.[12] There, the suspect, Perry, confessed to murdering his master, William Harrison, after Harrison disappeared. In his confession, Perry implicated his mother and brother as participating in the murder.[13] Harrison's body was not found.[14] Two years after all three were convicted and executed, Harrison showed up alive and well with an unbelievable story of how he was kidnapped in rural England, sold into slavery in Turkey, and escaped slavery as a stowaway on a ship before making his way to back to

11. *See* Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 385, 399–400 (1993). For example, in a murder case, a confession to murder would be insufficient without some other evidence, such as a body. *See id.* at 400–01, 401 n.76.

12. 14 Howell St. Tr. 1312 (1660).

13. *See id.* at 1315.

14. *See id.* at 1318.

England.[15] In the United States, there is a similar story: in 1812, a man who was convicted of murdering his missing brother-in-law based solely on his confession and, just days before his execution was scheduled, the brother-in-law was found alive in another state living under an assumed name.[16] After this case, the *corpus delicti* rule, the precursor to the modern corroboration rule, took hold in the United States, and by the mid-nineteenth century, nearly every jurisdiction had adopted some version of a corroboration requirement for confessions to all crimes.[17]

B. *Purpose of the Corroboration Rule*

Despite its long history, the corroboration rule is not constitutionally required, and its existence has been frequently questioned.[18] There is no agreement among courts or commentators about what role the rule is supposed to play in the criminal justice system.[19] The traditional justification is that it exists to prevent "errors in convictions based upon untrue confessions alone."[20] This justification stems from a general distrust of confessions in American criminal law.[21] Judges' experience show them that false confessions or admissions are alarmingly common, however, jurors do not have the same experience and tend to place too great of emphasis on confessions and admissions.[22]

Three other commonly given justifications for requiring corroboration are: (1) protecting a person who confesses to a crime that he or she did not commit or that did not occur due to psychological or

---

15. *See id.* at 1313, 1319–22.

16. *See generally The Trial of Stephen and Jesse Boorn*, 6 AM. ST. TR. 73 (1819); *see also* David. A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 829–31 (2003) (recounting the facts of the Boorn case).

17. *See* Mullen, *supra* note 11, at 401; *see also* Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638, 640 (1955) [hereinafter *Proof*] (explaining that the rule in England had been restricted to murder and bigamy, while in the United States, the rule applies to nearly all crimes).

18. *See* United States v. Brown, 617 F.3d 857, 860–62 (6th Cir. 2010); Mullen, *supra* note 11, at 418.

19. *Proof*, *supra* note 17, at 642 ("The courts seldom have articulated a rationale for the corpus delicti rule . . . . [T]he courts usually base their results on the great weight of judicial authority in support of the rule, rather than on an independent rationale.").

20. Warszower v. United States, 312 U.S. 342, 347 (1941).

21. *See* Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1122 (1984).

22. *See* Smith v. United States, 348 U.S. 147, 153 (1954) (stating that the courts, the police, and the medical professions all have a number of experiences dealing with false confessions but that jurors tend not to have the same experience).

mental issues;[23] (2) protecting individuals against confessions obtained through coercion, especially where the individual may be unable to establish the involuntary nature of the statement;[24] and (3) promoting better law enforcement practices by requiring law enforcement to investigate and collect evidence rather than rely on confessions.[25] The corroboration requirement also serves to protect a person who falsely confesses because of (1) a mistaken belief as to the facts or the law;[26] (2) a hope of receiving a lighter sentence when faced with what they believe is "overwhelming circumstantial evidence;"[27] (3) a fear of vigilante justice if released;[28] or (4) a desire to protect another person.[29] The rule also ensures that, after a confession has been obtained, the burden is on the government to present evidence and not on the accused to explain his or her innocence.[30]

Despite all of these justifications and benefits of having the corroboration requirement, some courts and commentators have questioned whether there should be a corroboration rule at all, especially with the developments regarding self-incrimination that have arisen since the 1950s, such as *Miranda v. Arizona*.[31] Ultimately, the long history of

23. Mullen, *supra* note 11, at 401–03. There are several aspects to this. The first is that some people are mentally unstable and confess to imaginary crimes. *Id.* at 402–03. The second is that some people confess to crimes that did occur because they feel guilty about it or because they are seeking "punishment or notoriety." *Id.* at 402.

24. Mullen, *supra* note 11, at 401, 404–05; *see Smith*, 348 U.S. at 153; Ayling, *supra* note 21, at 1129.

25. Mullen, *supra* note 11, at 401, 405–06; *see* Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) (citations omitted) ("[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."); *Smith*, 348 U.S. at 153; Ayling, *supra* note 21, at 1128–29.

26. *Proof*, *supra* note 17, at 643–44.

27. *See id.* at 642–43.

28. *Id.* at 643.

29. *See* United States v. Bryce, 208 F.3d 346, 354 (2d Cir. 1999).

30. Ayling, *supra* note 21, at 1129.

31. 384 U.S. 436, 444 (1966) (requiring that, in a custodial interrogation, a person be informed of the right to remain silent, of the right to the presence of an attorney, and that any statement may be used as evidence against him or her). *Compare* Mullen, *supra* note 11, at 399 (arguing that the recent developments in the law undercut the rationale for its continued existence), *and* United States v. Brown, 617 F.3d. 857, 860–62 (6th Cir. 2010) (suggesting that the continued existence of the rule should be reassessed in light of developments in the law regarding confessions and admissions), *with* Moran, *supra* note 16, at 817 (arguing that the corroboration rule still serves an important purpose despite changes in the law), *and Bryce*, 208 F.3d at 354–55 (justifying the role that the corroboration rule plays).

corroboration as part of American criminal law may be the best rationale for the rule's continuing existence.[32]

C. *Development of the Corroboration Rule*

The modern corroboration rule was created by the Supreme Court in two cases decided on the same day in 1954: *Opper v. United States*[33] and *Smith v. United States*.[34] Before these cases, two competing corroboration rules existed in federal courts, and the Supreme Court sought to resolve the circuit split.[35] Instead of adopting either of the existing rules, the Court formulated its own corroboration rule.[36] The Court announced the rule in *Opper*, explaining that:

> It is necessary, therefore, to require the Government to introduce *substantial independent evidence which would tend to establish the trustworthiness of the statement*. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.* Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.[37]

The Court did not explain what the operative phrase, "tend to establish the trustworthiness of [a] statement," meant, nor did the Court define what constitutes an "essential fact."

In *Smith*, the Court added that "[a]ll elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[38] The corroboration does not have to

---

32. *See Mullen*, *supra* note 11, at 406–07; *see also* Daeche v. United States, 250 F. 566, 571 (2d Cir. 1918) (citation omitted) ("That the rule has in fact any substantial necessity in justice, we are much disposed to doubt . . . . But we should not feel at liberty to disregard a principle so commonly accepted . . . .").

33. 348 U.S. 84, 93 (1954).

34. 348 U.S. 147, 156 (1954).

35. *See* Forte v. United States, 94 F.2d 236, 244 (D.C. Cir. 1937) (requiring corroborating evidence to corroborate the corpus delicti); *Daeche*, 250 F. at 571 (requiring only corroboration of the circumstances and not requiring corroboration of the corpus delicti); *see also Opper*, 348 U.S. at 92–93 (explaining the two competing rules).

36. *See Opper*, 348 U.S. at 92–93.

37. *Id.* at 93 (emphasis added) (citation omitted).

38. *Smith*, 348 U.S. at 156.

independently establish the crime; "it is sufficient if the corroboration merely fortifies the truth of the confession."[39] In a footnote, the Court noted that "[a]dmissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated."[40] These two cases formed the foundation for the corroboration rule in military courts.

II. THE SWINGING PENDULUM: CORROBORATION IN MILITARY COURTS

The application of the corroboration rule in the military has been far from consistent and marked by swings back and forth between extremes. The first part of this section begins with the origins of the corroboration rule in military courts before *Opper* and *Smith* and the impact of those cases on the military's corroboration rule. The next part of this section discusses the corroboration rule as codified in the Military Rules of Evidence and the courts' struggles in interpreting and applying the rule prior to *Adams*. Finally, this section concludes by discussing the decision in *Adams* and its interpretation of the corroboration rule.

A. *Corroboration Pre-MREs (1951–1980)*

Prior to *Opper* and *Smith*, the 1951 *Manual for Courts-Martial* (MCM) adopted the *corpus delicti* rule, which required evidence apart from the accused's statement that the offense charged "had probably been committed by someone" in order for a confession or admission to be admissible.[41] After *Opper* and *Smith*, the Court of Military Appeals considered the conflict between the corroboration rule announced in those cases and the rule in the 1951 MCM. The Court of Military Appeals held that the rule from *Opper* and *Smith* did not apply to military courts and that the 1951 MCM rule remained the standard for corroboration in the military.[42]

39. *Id.*

40. *Id.* at 155 n.3.

41. MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. 140(a) (1951).

42. *See* United States v. Smith, 32 C.M.R. 105, 108–20 (C.M.A 1962) (holding, after a lengthy discussion, that the 1951 MCM corroboration rule applies to the military despite the Supreme Court's holdings in *Opper* and *Smith*); United States v. Villasenor, 19 C.M.R. 129, 131–33 (C.M.A 1955) (holding that the President has the authority to promulgate rules for military courts, so the 1951 MCM's corroboration rule applies to military courts rather than the Supreme Court's rule).

The updated 1968 version of the MCM abandoned the 1951 MCM corroboration rule in favor of a rule based on *Opper* and *Smith*,[43] and this rule was subsequently included in the 1969 version of the MCM.[44] Rather than quote the language from *Opper*, the 1968 MCM created a rule based on the *Opper* decision that attempted to explain what the corroboration rule from *Opper* required. The text of the MCM's rule stated:

> It is a general rule that a confession or admission of the accused cannot be considered as evidence against him on the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which *corroborates the essential facts* admitted sufficiently to justify an inference of their truth.[45]

Notably, the rule did not include the trustworthiness of the statement as part of the standard for corroboration, as in *Opper*, but instead only that the "essential facts admitted" had been *sufficiently* corroborated.[46] The rule also required that an essential fact in a statement had to be *individually* corroborated in order for the part of the accused's statement regarding that essential fact to be admissible.[47] The rule stated:

> If the independent evidence raises an inference of the truth of some, but not all, of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission which are so corroborated by the independent evidence.[48]

The word trustworthiness did not even appear in the 1968 MCM corroboration rule, the 1969 MCM corroboration rule, or in the drafters' analysis of the rule.[49] Although purporting to adopt the Supreme Court's corroboration rule in *Opper* and *Smith*, the standard in the 1968 MCM and 1969 MCM departed significantly from the Supreme Court's rule by requiring corroboration of each essential fact in the statement in order for

43. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. 140(a)(5) (1968) [hereinafter 1968 MCM].

44. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. 140(a)(5) (1969) [hereinafter 1969 MCM]; U.S. DEP'T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, para. 140(a)(5) (July 28, 1970) [hereinafter DA PAM. 27-2].

45. *See* 1968 MCM, *supra* note 43 (emphasis added).

46. *See id.*; 1969 MCM, *supra* note 44.

47. *See* 1969 MCM, *supra* note 44; 1968 MCM, *supra* note 43.

48. 1968 MCM, *supra* note 43.

49. *See* 1969 MCM, *supra* note 44; 1968 MCM, *supra* note 43; DA PAM. 27-2, *supra* note 44.

that essential fact to be admissible, rather than requiring that the statement alone be corroborated.[50]

B. *Military Rules of Evidence Corroboration Rule (1980–2015)*

The formulation of the corroboration rule provided in the 1969 MCM laid the foundation for the rule when the Military Rules of Evidence were adopted in 1980. The corroboration requirement was codified as MRE 304(g), which later became MRE 304(c).[51] Like the 1969 MCM version, the MRE 304 corroboration rule required corroboration of the essential facts in the confession or admission and required individual corroboration of each essential fact in order for that part of the accused's statement to be admissible.[52] Once again, there was no reference to trustworthiness in either the text of the rule or in the drafters' analysis of it.[53]

Although the singular focus on corroborating the essential facts in the statement should have made the rule easy to apply, in practice the rule was still "prove[n] easier to state than to apply."[54] In part, this was due to military courts largely ignoring the requirement in the text of the rule that each essential fact must be individually corroborated and instead applying a purpose-based reading of the rule.[55] Under the purpose-based reading, courts still required that the essential facts in the accused's statement be corroborated, but focused on ensuring that corroboration of the essential facts made the statement, as a whole, trustworthy, rather than rigorously identifying the essential facts in the statement and ensuring that each essential fact was individually corroborated.[56] However, this purpose-

50. *See* 1969 MCM, *supra* note 44; 1968 MCM, *supra* note 43. By requiring each essential fact be corroborated individually, the 1968 and 1969 *MCM*s also rejected the holding in *Smith* that corroboration can "bolster the statement itself and thereby prove the offense 'through' the statements of the accused." *See* Smith v. United States, 348 U.S. 147, 156 (1954).

51. *See* Exec. Order No. 12,198, 45 Fed. Reg. 16,932, 16,945 (Mar. 12, 1980) (amending 1969 MCM, *supra* note 44 and promulgating MRE 304(g)); Exec. Order No. 13,643, 78 Fed. Reg. 29,559, 29,563–64 (May 21, 2013) (revising 2012 MCM, *supra* note 6 and moving corroboration to 304(c)).

52. *See* SUPPLEMENT TO MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. 304(c) (2012) [hereinafter 2012 MCM SUPPLEMENT].

53. *See id.*; 2012 MCM, *supra* note 6, app. 22 at A22-13 (analyzing 304(g)).

54. STEPHEN A. SALTZBURG ET AL., 1 MILITARY RULES OF EVIDENCE MANUAL § 304.02 cmt. 5 (8th ed. 2015).

55. *See* United States v. Adams, 74 M.J. 137, 143 (C.A.A.F. 2015) (Baker, C.J., dissenting) (explaining that the court has not previously adopted a literal reading of the corroboration rule because it would be unworkable and, in the present case, would be redundant with other evidence).

56. *See, e.g.*, *id.* at 142–43; United States v. Seay, 60 M.J. 73, 80 (C.A.A.F. 2004) ("[T]he [corroboration] rule simply requires a presence of facts that enable the members to infer the truth of the essential facts in the confession."); United States v. Maio, 34 M.J. 215, 218–19 (C.A.A.F. 1992) (finding the essential facts in the accused's statement were sufficiently

based reading of the rule resulted in wildly inconsistent applications of the rule, leading one commentator to conclude that facing a question of corroboration over fifty years after *Opper* was "in many respects no less daunting than it was immediately after adoption of the *Opper* rule."[57] Because of the difference between the text of the rule and the purpose-based reading of it, between 1968 and 2015, military courts were said to be "riding a pendulum back and forth" between requiring an extremely high amount of corroboration and, conversely, requiring virtually no corroboration.[58] In 2015, the C.A.A.F. sought to provide clarity in the *Adams* decision.

C. United States v. Adams

In *United States v. Adams*, the defendant, Specialist (SPC) Adams, confessed to stealing cocaine from a drug dealer named Ootz at gunpoint after one of his co-conspirators implicated him in the robbery.[59] The only evidence presented by the government at trial, in addition to SPC Adams's confession, was: (1) a handgun seized from SPC Adams's house that was the same make and model as the one he said he used during the robbery; (2) testimony of two Criminal Investigation Division Special Agents that Timothy Ootz was a former soldier and known drug dealer; and (3) that the two locations where SPC Adams said the larceny occurred were near one another and close to post.[60] Based on this evidence, SPC Adams was convicted of larceny at court-martial.[61]

The C.A.A.F. overturned SPC Adams's conviction and held that the corroboration rule meant what it said—that each essential fact must be individually corroborated and any essential fact that is not corroborated is inadmissible and must be removed from the accused's statement.[62] The C.A.A.F. went on to state that "[t]here is no 'tipping point' of corroboration which would allow admission of the entire confession if a certain percentage of essential facts are found to be corroborated."[63] For example, if the judge determines that a confession contains five essential facts, and if four of the essential facts are sufficiently corroborated, those

---

corroborated without specifying what those facts were and without any direct evidence of the accused's alleged drug).

57. Moore, *supra* note 8, at 130.

58. *Adams*, 74 M.J. at 141 (Baker, C.J., dissenting).

59. *See id.* at 138. Ootz and the co-conspirators did not testify at trial. *See id.*

60. *See id.* at 138, 141.

61. *See id.* at 138.

62. *See id.* at 140–41.

63. *Id.* at 140.

four essential facts are admissible, but the fifth, uncorroborated essential fact is not admissible and must be excised from the statement.[64] The C.A.A.F. concluded there was no corroboration of the act of larceny.[65] Therefore, the part of SPC Adams's statement regarding taking the cocaine from Ootz was inadmissible because it was not corroborated and should have been excised from the statement.[66] Without that part of his statement, there was no admissible evidence that a crime of larceny had even occurred.

Chief Judge Baker dissented, joined by Judge Ryan.[67] He concluded that the majority's formulation of the rule was unworkable and would prevent the government from "using the confession to fill in essential facts that might not otherwise be known to the government."[68] He stated that "because the only essential fact in [Adams's] statement that is not demonstrated by independent evidence is the actual theft of the cocaine, the Court's decision effectively returns the law to a corpus del[i]cti test."[69] The difference between the majority and the dissenting opinions comes down to taking a textualist reading of the rule (the majority) or a purpose-based reading of the rule (the dissent).

III. THE NEW MRE 304(C) CORROBORATION RULE

Almost immediately after *Adams* was decided, the process was underway to overturn it. The first part of this section explains the amendment process. In the next two parts, this section compares the old corroboration rule with the amendments and explains what changes were made to the rule. Then this section concludes by discussing several sources that can be used to help interpret the new corroboration rule.

A. *The Amendment Process*

Within weeks of the C.A.A.F.'s decision in *Adams*, the military sexual assault advocacy group, Protect Our Defenders, submitted proposed changes to MRE 304(c) to Senator Kirsten Gillibrand.[70] The holding in *Adams* had the potential for having a far-reaching impact,

64. *See id.* at 140–41.

65. *See id.* at 141.

66. *See id.*

67. *See id.* (Baker, C.J., dissenting).

68. *Id.*

69. *Id.* at 141–42.

70. *See* PROTECT OUR DEFENDERS, POD 2015–2016 POLICY PRIORITIES 2–3, http://protectourdefenders.com/downloads/POD_Policy_Priorities.pdf [https://perma.cc/526N-GJE3].

notably on the military's ability to prosecute sexual assault cases.[71] Twenty-two days after *Adams* was decided, the Senate Armed Services Committee included a provision in the FY16 NDAA directing specific textual changes be made to MRE 304(c).[72] A different provision was ultimately included in the FY16 NDAA, which did not direct specific changes to the rule, but instead stated: "To the extent the President considers practicable, the President shall modify Rule 304(c) of the Military Rules of Evidence to conform to the rules governing the admissibility of the corroboration of admissions and confessions in the trial of criminal cases in the United States district courts."[73] On May 20, 2016, the President promulgated the new MRE 304(c) which made all of the changes to the rule initially proposed in the Senate.[74]

B. *Comparing the Old and New Versions of MRE 304(c)*

The amendment to MRE 304(c) changed the corroboration rule in two significant respects. First, it removed the requirement that each essential fact had to be individually corroborated in order to be admissible.[75] The new rule replaced it with a provision explicitly stating the opposite.[76] The new rule has a tipping point and once there is sufficient corroboration, the entire statement is admissible.[77] Second, the new MRE 304(c) changes the standard of corroboration. The standard is no longer corroborating the "essential facts admitted" in the statement.[78] Instead, the new standard is that a confession or admission is admissible if independent evidence "has been admitted into evidence that would *tend to establish the trustworthiness of the admission or confession*."[79] The drafters' analysis

71. *See, e.g.*, United States v. Latour, 75 M.J. 723, 731–33 (N-M. Ct. Crim. App. 2016) (applying the holding in *Adams* to uphold the trial judge's exclusion of the accused's admission regarding sexual assault because the admissions were insufficiently corroborated).

72. *See* National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th Cong. § 546 (as reported by S. Comm. on Armed Servs., May 19, 2015).

73. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015).

74. *See* Order 13,730, supra note 1, at 487–88 (amending MRE 304(c)); National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th Cong. § 546 (as reported by S. Comm. on Armed Servs., May 19, 2015).

75. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c)(1) (2016) [hereinafter 2016 MCM]; *see also infra* app. C.

76. 2016 MCM, *supra* note 75 (" Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.").

77. *See id.*

78. *Compare* 2012 MCM SUPPLEMENT, *supra* note 52, *with* 2016 MCM, *supra* note 75.

79. 2016 MCM, *supra* note 75.

of the rule states that the change "brings military practice in line with federal practice" and cites to *Opper* and *Smith*.[80] Much like trustworthiness did not appear anywhere in the old rule, the phrase "essential facts" similarly does not appear in the text of the new rule and the drafters' analysis of it.

C. *Does the New MRE 304(c) Do More than Overrule Adams?*

In analyzing the scope of the changes to MRE 304(c), the basic question is whether the changes alter the corroboration analysis to the minimum extent necessary to overrule *Adams*, and return the corroboration analysis to what it had been prior to *Adams*, or whether the changes represent a more significant change to the corroboration analysis. As a threshold matter, the two changes to MRE 304(c) are related to one another. The introduction of a tipping point necessarily requires the focus to be on the statement itself rather than on each essential fact contained in it. Therefore, to overrule *Adams*, it was necessary to change the standard to one focused on corroborating the statement as a whole.

Despite the necessity of changing the standard in order to overturn *Adams*, the object of corroboration in the new rule is nevertheless different than the object of corroboration under the old rule. Under the old corroboration rule, the essential facts contained in the statement were being corroborated,[81] whereas under the new rule the statement itself is being corroborated.[82] The removal of essential facts from the rule could indicate a repudiation of corroborating the essential facts in the statement.[83] Additionally, the intent of the new MRE 304(c) was to bring it in line with *Opper*, *Smith*, and federal practice, which suggests a broader intent to overhaul the rule beyond just overturning *Adams*.[84] Therefore, to evaluate the scope of the changes to MRE 304(c), it is necessary to consider all of the potential ways of interpreting it.

---

80. *Id.* app. 22 at A22-12.

81. *See* United States v. Adams, 74 M.J. 137, 140–41 (C.A.A.F. 2015); 2012 MCM SUPPLEMENT, *supra* note 52.

82. 2016 MCM, *supra* note 75.

83. *See* United States v. Matthews, 68 M.J. 29, 37 (C.A.A.F. 2009) ("When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." (quoting Stone v. Immigration & Naturalization Serv., 514 U.S. 386, 397 (1995))). In *Opper*, corroborating essential facts was one way to corroborate a statement but not necessarily the only way. *See* Opper v. United States, 348 U.S. 84, 93 (1954); *see also* Smith v. United States, 348 U.S. 147, 155 n.3, 156 (1954) (providing two other ways of corroborating a statement).

84. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015); 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c), app. 22 at A22-12. In fact, *Adams* is not even cited as a reason for amending the rule.

D. *Interpreting the New Trustworthiness Standard of Corroboration*

Determining how expansive the changes in the new MRE 304(c) are requires examining the plain meaning of the rule, the intent behind it to follow federal practice, and the context provided by prior military case law in which the changes were made. These sources will each be briefly introduced before being used in Section IV of this Article to interpret the new MRE 304(c).

1. Plain Meaning

The rules of statutory construction apply to the MREs and the MREs are usually construed in accordance with their plain or ordinary meaning.[85] The dictionary definition of the word "trustworthy" is "worthy of trust; dependable; reliable."[86] Although this generic definition is of little use, when language in a rule or statute has a common law meaning or has been judicially interpreted, that meaning usually applies rather than the plain meaning of the words.[87] Because "tend to establish the trustworthiness" is taken from *Opper*,[88] the federal courts have had over sixty years to interpret what it means. Therefore, plain meaning suggests looking to federal practice to determine the meaning of the phrase "tend to establish the trustworthiness" as used in MRE 304(c).

2. Corroboration in Federal Courts After *Opper* and *Smith*

The corroboration rule in federal courts is potentially the most helpful source for interpreting the new standard of corroboration. First, the plain meaning analysis directs one to federal practice given the significant experience of federal courts in interpreting the same phrase.[89] Second, Congress's intent in directing the President to amend MRE 304(c) was

85. *See* United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007). This is ordinarily done by reference to a dictionary. *See* 2A NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:28 (7th ed. rev. vol. 2014) ("[U]nless otherwise defined, words are interpreted to take their ordinary, contemporary, common meaning in the absence of persuasive reasons to the contrary."); *see, e.g.*, *Matthews*, 68 M.J. at 36–37 (using dictionaries to determine the meaning of the word "courts" within the MREs).

86. *Trustworthy*, WEBSTER'S NEW WORLD DICTIONARY 1436 (3d College ed. 1988). Trust is similarly defined as a "firm belief or confidence in the honesty, integrity, reliability, justice, etc. of another person or thing." *Id.*

87. *See* SINGER & SINGER, *supra* note 85, § 47:30.

88. *Opper*, 348 U.S. at 93.

89. *See* SINGER & SINGER, *supra* note 85, § 47:30 (stating that when legal language is adopted from another jurisdiction, the construction of that language within that jurisdiction is also adopted).

that it conform to the corroboration rule in federal practice.[90] Third, the drafters' analysis accompanying the new MRE 304(c) states that their intent was to "bring[] military practice in line with federal practice" and cites *Opper* and *Smith* as the authorities for federal practice.[91] Therefore, federal practice is particularly relevant as a source for interpreting the new MRE 304(c).

The Supreme Court has not substantively altered the corroboration rule since *Opper* and *Smith*.[92] Unlike the MREs, there is no corroboration rule in the Federal Rules of Evidence.[93] Because of this, the federal courts of appeals have had the opportunity to interpret and apply *Opper* and *Smith* independently since 1954. As a result, different variations of the corroboration rule have developed, and there are differences regarding almost every aspect of corroboration, including: instances when corroboration is required,[94] how much corroboration is required,[95] what must be corroborated,[96] and the relationship that the corroboration must have with the statement.[97]

---

90. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015).

91. *See* 2016 MCM, *supra* note 75, app. 22 at A22-12.

92. The only case to consider corroboration in any depth was *Wong Sun v. United States*, 371 U.S. 471, 488–91, 489 n.15 (1963).

93. *See* 2016 MCM, *supra* note 75, app. 22 at A22-5 (stating that, among others, MRE 304 has no equivalent in the Federal Rules of Evidence).

94. *See* United States v. Bryce, 208 F.3d 346, 355 (2d Cir. 1999) (requiring some statements to be made contemporaneously with the offense being corroborated); United States v. Pennell, 737 F.2d 521, 536–37 (6th Cir. 1984) (stating that admissions before or during the commission of a crime do not require corroboration); United States v. O'Connell, 703 F.2d 645, 647 (1st Cir. 1983) (discussing a circuit split regarding whether all confessions or admissions must be corroborated or only those made to law enforcement after the crime).

95. *Compare* United States v. Moses, 137 F.3d 894, 905 (6th Cir. 1998) (stating that the corroboration "hurdle is low"), *with* Yarbrough v. United States, 309 F.2d 936, 937–38 (10th Cir. 1962) (requiring a lot of corroborating evidence).

96. *See* United States v. Kirk, 528 F.3d 1102, 1112 (8th Cir. 2008) ("Corroborative facts may be of any kind, so long as they tend to produce confidence in the truth of the confession."). In *Kirk*, the court also considered the detailed nature of the admission, the voluntariness of it, and its reasonableness. *Id.*; *see also Bryce*, 208 F.3d at 354–55 (allowing corroboration based upon content of the statement, the context in which it was given, and the nature of the statement itself); United States v. Calhoun, No. 92-2011, 1993 WL 280324, at *3 (6th Cir. July 26, 1993) (per curiam) (unpublished table decision) (stating that the essential facts must be corroborated).

97. *Compare* United States v. Stephens, 482 F.3d 669, 673 (4th Cir. 2007) (requiring corroboration of the connection between co-conspirators in a conspiracy rather than just corroboration of the statement), *and Calhoun*, 1993 WL 280324 at *3 (requiring separate corroboration for each crime charged rather than for the statement itself), *with* United States v. Brown, 617 F.3d 857, 863–64 (6th Cir. 2010) (stating that corroboration of part of a statement can corroborate the entire statement), *and* United States v. Sterling, 555 F.3d 452, 457 (5th Cir. 2009) (stating that corroboration of some crimes in a statement can corroborate other crimes in the statement).

3. Prior Military Case Law

Military case law regarding the old corroboration rule should not be ignored in interpreting the new rule. Prior to *Adams*, military courts largely ignored the strict requirement in the text of the rule that each essential fact had to be independently corroborated on a one-for-one basis in favor of a purpose-based reading.[98] However, military courts still required that at least some essential facts in the statement had to be corroborated.[99] There is a risk of giving prior military case law too much weight in interpreting the new MRE 304(c) because those cases were applying a corroboration rule whose text required that the essential facts be corroborated whereas the text of the new rule no longer has that requirement. Therefore, although prior military case law should not be completely ignored, it should be approached cautiously as a tool for determining the scope of the changes to MRE 304(c).[100]

IV. DECIPHERING THE MEANING OF "TEND TO ESTABLISH THE TRUSTWORTHINESS"

Understanding the meaning of "tend to establish the trustworthiness" in the new corroboration rule is the key to understanding the meaning of the new rule. To that end, this section attempts to elucidate what is being corroborated, how what is being corroborated must relate to what is doing the corroboration, and what constitutes sufficient corroboration. After that analysis, this section concludes that the best interpretation of the new corroboration rule is that it constitutes a return to the old essential fact analysis prior to *Adams*.

A. *Possible Impacts of a New Standard*

Beyond overturning the requirement that each essential fact in a statement be individually corroborated, the new MRE 304(c) corroboration standard potentially impacts or changes the corroboration standard in three areas. These areas are: (1) what must be corroborated,

98. *See, e.g.*, United States v. Seay, 60 M.J. 73, 80 (C.A.A.F. 2004) (finding sufficient corroboration for larceny of a wallet from a murder victim despite no wallet being found and no evidence of larceny besides the accused's confession); United States v. Maio, 34 M.J. 215, 218 (C.M.A. 1992) (finding sufficient corroboration for drug use without direct evidence of use); *see also* United States v. Adams, 74 M.J. 137, 142–43 (C.A.A.F. 2015) (Baker, C.J., dissenting) (stating that the Court has applied a purpose-based reading of the rule in prior cases).

99. *E.g.*, *Seay*, 60 M.J. at 80 (finding sufficient corroboration for larceny based on the surrounding circumstances being corroborated despite there being no corroboration of the act of larceny itself).

100. However, if the new MRE 304(c) is interpreted to still require that facts in the statement be corroborated, then prior military case law is relevant and largely applicable.

(2) what relationship the corroborating evidence must have with the statement, and (3) how much evidence is necessary to corroborate a statement.

1. What Must be Corroborated?

"[T]end to establish the trustworthiness *of the admission or confession*" makes the object of corroboration the admission or confession itself, not the essential facts contained in the statement as under the old rule.[101] The purpose of corroboration is to show that the statement itself is trustworthy rather than to show that the essential facts in the statement are true. Under the old MRE 304(c) corroboration rule, the object of corroboration was limited to the essential facts in the statement, and the essential fact analysis was focused on the substantive content of the statement. Specifically, it focused on one particular type of content in the statement—those facts that were determined by a military judge to be essential. However, introducing evidence that supports the truth of facts in the statement is not necessarily the only way to show that a statement is trustworthy.[102]

In federal courts, three methods of corroborating an accused's statement have been recognized, although not all federal courts have endorsed all three methods.[103] The three methods of corroborating a statement are: (1) corroborating facts in the statement,[104] (2) corroborating the circumstances in which the statement was made,[105] and (3) showing that the internal character of the statement makes the statement reliable.[106]

---

101. 2016 MCM, *supra* note 75 (emphasis added).

102. A statement could be considered trustworthy for reasons other than corroborating facts in the statement, such as: who made the statement, the circumstances in which the statement was made, the believability of the statement, the amount of detail in the statement, the motivations of the person making the statement, and whether the person has a history of making truthful statements. *See* United States v. Hall, 165 F.3d 1095, 1110–11 (7th Cir. 1999) (listing factors for determining trustworthiness regarding the residual hearsay exception).

103. *Compare* United States v. Bryce, 208 F.3d 346, 355–56 (2d Cir. 1999) (allowing all three types of corroboration), *with* United States v. Todd, 657 F.2d 212, 216 (8th Cir. 1981) (allowing only one type of corroboration: corroborating facts in the statement).

104. *See, e.g.*, United States v. Maxwell, 363 F.3d 815, 819 (8th Cir. 2004) (listing evidence introduced at trial that corroborated facts in the defendant's statement); United States v. Howard, 179 F.3d 539, 543 (7th Cir. 1999) (corroborating a statement by corroborating facts in the statement).

105. *See, e.g.*, *Bryce*, 208 F.3d at 355 ("A defendant's statement made in a manner and in circumstances sufficient to support a finding beyond a reasonable doubt needs no corroboration."); United States v. Kerley, 838 F.2d 932, 940 (7th Cir. 1988) (holding that voluntary statements which were not made during interrogation required less corroboration).

106. *See, e.g.*, *Bryce*, 208 F.3d at 355–56; United States v. Gresham, 585 F.2d 103, 106 (5th Cir. 1978) (stating that corroboration can come from the "detailed nature of the confession itself").

Corroborating the facts in the statement is the most common way that federal courts corroborate statements.[107] That is, the statement contains factual assertions and other evidence in the case verifies, supports, or is consistent with those factual assertions.[108] A basic example of this type of corroboration would be Doe makes a statement that he punched Roe and that statement is corroborated by Roe saying Doe punched him and Roe having a black eye. All federal courts accept corroborating the facts in the statement as a way to corroborate the statement itself.[109]

Some federal courts have also considered the circumstances or context in which a statement was made in evaluating whether it is trustworthy.[110] In determining if a statement is trustworthy, these courts will consider factors such as: to whom the statement was made, why it was made, when it was made, and whether it was made voluntarily.[111] Under the context view, the trustworthiness of the admission can be derived, at least in part, from surrounding circumstances that suggest the statement is reliable.[112] For example, suppose Doe sexually assaulted Roe

107. *See, e.g.*, United States v. Cavillo-Rojas, 510 F. App'x 238, 244–55 (4th Cir. 2013) (finding corroboration insufficient by only considering facts in the statement); Yarbrough v. United States, 309 F.2d 936, 937–38 (10th Cir. 1962) (finding insufficient corroboration by only considering evidence introduced at trial).

108. *See* United States v. Corona-Garcia, 210 F.3d 973, 979 (9th Cir. 2000).

109. When determining whether a statement is adequately corroborated, the Supreme Court has consistently looked to whether the independent evidence in the case corroborated the facts in the statement. *See* Wong Sun v. United States, 371 U.S. 471, 488–91 (1963) (finding that a co-conspirator's after-the-fact written confession was not admissible as corroboration and, as a result, there was insufficient corroboration); United States v. Calderon, 348 U.S. 160, 164–69 (1954) (finding sufficient corroboration of tax evasion with bank records and tax records); Smith v. United States, 348 U.S. 147, 157–59 (1954) (finding sufficient corroboration of tax evasion with documents and testimony regarding the Defendant's net worth); Opper v. United States, 348 U.S. 84, 93–94 (1954) (finding sufficient corroboration for bribery based on circumstantial evidence).

110. *See Bryce*, 208 F.3d at 355; *see also Calderon*, 348 U.S. at 163–64.

111. *See* United States v. Valdez-Novoa, 780 F.3d 906, 925 (9th Cir. 2015) (finding statement inherently reliable because it was voluntarily made after being advised of his rights under *Miranda*); United States v. Falls, 543 F. App'x 54, 57–58 (2d Cir. 2013) (summary order) (finding telephone call by the Defendant was self-corroborating because it was made to his brother and would have risked his own life and his brother's life if he were lying); United States v. Krikheli, 461 F. App'x 7, 9 (2d Cir. 2012) (summary order) (finding that corroboration was not necessary because the statements were made in furtherance of a conspiracy to a person the Defendant believed was a co-conspirator); United States v. Kirk, 528 F.3d 1102, 1112 (8th Cir. 2008) (corroborating a statement, in part, because it was voluntary); *Bryce*, 208 F.3d at 355 (finding insufficient corroboration, but taking into consideration the fact that the statements were made on a wiretapped phone while negotiating a drug deal).

112. *See Valdez-Novoa*, 780 F.3d at 925; *Falls*, 543 F. App'x at 57–58; *Kirk*, 528 F.3d at 1112; *see also Calderon*, 348 U.S. at 163–64 (finding that circumstances can also require more corroboration). Many of the hearsay exceptions are also justified for this same reason—that the

when Roe was asleep and the next morning, before any law enforcement involvement, Doe sends an unprompted text message to Roe apologizing for sexually assaulting Roe while Roe was asleep the previous night. Most courts have either failed to address this type of corroboration or have limited corroboration to facts in the statement.[113]

A few courts will also consider the internal character of the statement itself in determining if the statement is trustworthy, such as: the amount of detail in the statement, the complexity of the statement, the internal coherence of the statement, and the plausibility of the statement.[114] Usually, these factors supplement other evidence which corroborates facts in the statement.[115] An example of this type of corroboration would be a detailed, logical, and coherent ten-page written statement by Doe confessing to punching Roe and explaining how he knows Roe, why he punched Roe, and the circumstances surrounding punching Roe.

Although there are three methods in federal practice to corroborate a statement, the text of MRE 304(c) limits the methods of corroboration available in military courts. Self-corroboration—corroboration based on

---

circumstances in which a statement is made can make it more reliable. *See, e.g.*, Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 231–36 (1998).

113. Only the Second Circuit has affirmatively embraced context in which a statement was made as a method of corroboration. *See Bryce*, 208 F.3d at 355. The Ninth Circuit has a two-part test and one of the parts can be proven by the context in which the statement was made, but the other part requires evidence that a crime occurred. *See Valdez-Novoa*, 780 F.3d at 925; United States v. Lopez-Alvarez, 970 F.2d 583, 592–93 (9th Cir. 1992). Other circuits have used context to bolster corroboration of the facts in the statement, but the focus remains on corroborating facts. *See, e.g.*, *Kirk*, 528 F.3d at 1112; United States v. Kerley, 838 F.2d 932, 939–40 (7th Cir. 1988).

114. *See* United States v. Sterling, 555 F.3d 452, 457 (5th Cir. 2009) (citing United States v. Gresham, 585 F.2d 103, 106 (5th Cir. 1978)) (stating that the detailed nature of a statement can be corroboration); *Kirk*, 528 F.3d at 1112 (considering the "elaborate" and detailed nature of the statement and that it that provides a "reasonable explanation" as part of the corroboration analysis); United States v. Varela-Garcia, 87 F. App'x 795, 798–99 (3rd Cir. 2004) (considering the detailed nature of the statement); United States v. Whittaker, 67 F. App'x 697, 701–02 (3rd Cir. 2003) (considering the detailed nature of the statement (citing Virgin Islands v. Harris, 938 F.2d 401, 410 (3rd Cir. 1991))); United States v. Wolf, 535 F.2d 476, 479 (8th Cir. 1976) (per curiam) (finding that the statement was a reasonable explanation).

115. *See, e.g.*, *Sterling*, 555 F.3d at 456–57 (finding that a statement confessing to drug trafficking and firearm offenses was adequately corroborated based on both the detailed nature of the statement as well as Defendant's possession of firearms and possession of drugs); *Kirk*, 528 F.3d at 1112 (finding a statement adequately corroborated based on the evidence offered at trial as well as the statement being detailed in a reasonable explanation about what happened). However, some courts have cited to a footnote in *Smith* that some statements do not require corroboration and are instead self-corroborating. *See Bryce*, 208 F.3d at 355 (citing *Smith*, 348 U.S. at 155 n.3). Those courts state that, in some circumstances, the internal character of the statement may be such that no corroboration at all is required and a person can be convicted based upon his or her admissions or confession alone. *See id.*

the internal character of the statement—is rejected by MRE 304(c) because the only method of corroboration the rule allows is for independent evidence to be "admitted into evidence".[116] Allowing a statement to be adequately corroborated based solely on the internal character of the statement is, by definition, corroboration without independent evidence.

Just as clearly, the text of the new MRE 304(c) allows for corroborating a statement by corroborating facts in the statement.[117] Corroboration of sufficient facts in the statement makes the statement as a whole trustworthy and admissible. Importantly, MRE 304(c) no longer limits corroboration to just those facts that the military judge determines to be essential facts.[118] Rather, corroboration of any fact in the statement could be relevant in tending to establish the trustworthiness of the statement.

Whether MRE 304(c) allows for the context in which the statement was made to be part of the corroboration analysis is less clear. It is neither specifically prohibited nor specifically allowed by the text of the rule. For several reasons, however, reading MRE 304(c) to allow for corroboration based upon the context in which the statement was given is a more tortured reading of the rule than limiting corroboration to only the facts contained in the statement. First, MRE 304(c)(2) states that "[n]ot every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety."[119] This implies that at least *some* elements or facts must be corroborated. Second, MRE 304(c)(4) states that "[t]he independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession."[120] This implies that the corroborating evidence will corroborate facts contained in the statement and need only raise an

116. 2016 MCM, *supra* note 75. Even though the rule purports to follow *Opper* and *Smith*, it specifically rejects one type of corroboration endorsed by *Smith*. Because corroboration is inherently case specific, the internal character of a statement may still be relevant in determining whether the facts corroborated sufficiently relate to the statement as a whole in order to corroborate it. Once a statement is admitted, the character of it is relevant to the trier of fact in determining how much weight to give it. *See id.* at MIL. R. EVID. 304(c).

117. *See id.* at MIL. R. EVID. 304(c)(2).

118. *See id.* at MIL. R. EVID. 304(c); 2012 MCM, *supra* note 7, at MIL. R. EVID. 304(g) (repealed 2014).

119. 2016 MCM, *supra* note 73, at MIL. R. EVID. 304(c)(2).

120. *Id.* at MIL. R. EVID. 304(c)(4).

inference of their truth.[121] Therefore, although the text is more consistent with not permitting corroboration based upon context, it does not prohibit it, so it is necessary to examine the intent behind the new rule.

The intent behind the new MRE 304(c) to follow federal practice provides limited help in determining if the rule allows for corroboration of the context in which the statement was made because some federal courts allow it and some do not.[122] However, the majority of courts have either not discussed using context to corroborate or limited the corroboration analysis to only consider corroborating facts contained in the statement.[123] Military courts prior to *Adams* also limited corroboration to corroborating facts in the statement.[124] Although not conclusive, the text of the rule is more consistent with limiting corroboration to the facts in the statement and this limitation is also consistent with how the majority of federal courts corroborate statements and with prior military case law. Therefore, although interpreting the new MRE 304(c) to allow for corroboration based upon the context in which the statement was made does not violate the text of the rule, it is a strained reading of it.[125]

---

121. *See id.* (stating that the corroborating evidence "need raise only an inference of the truth" of the statement).

122. *Compare* United States v. Bryce, 208 F.3d 346, 355 (2d Cir. 1999) ("A defendant's statement made in a manner and in circumstances sufficient to support a finding beyond a reasonable doubt needs no corroboration."), *with* United States v. Calhoun, No. 92-2011, 1993 WL 280324, at *3 (6th Cir. July 26, 1993) (per curiam) (unpublished table decision) ("[T]he law in this Circuit requires that the *essential* facts in an admission or a confession be corroborated."). Before the President promulgated the new MRE 304(c), one commentator proposed a slightly different formulation of a new MRE 304(c) along with a more substantial drafter's analysis that embraced corroboration based upon context as well as content. *See* Major Brittany Warren, *A Proposal to Amend Military Rule of Evidence 304 to Conform with Federal Practice*, 4 ARMY LAW. 25, 28 (2016). A drafter's analysis similar to the one Warren proposed would likely tip the balance in favor of allowing corroboration based on context.

123. *Compare* United States v. Stephens, 482 F.3d 669, 672–73 (4th Cir. 2007) (not discussing corroboration by context), *and* United States v. Lopez-Alvarez, 970 F.2d 583, 591–92 (9th Cir. 1992) (vaguely explaining corroboration without stating if context can be used), *with Calhoun*, 1993 WL 280324, at *3 (limiting corroboration to only essential facts in the statement), *and* United States v. Todd, 657 F.2d 212, 216 (8th Cir. 1981) (requiring corroboration of the essential elements of the charged crime).

124. *See* United States v. McClain, 71 M.J. 80, 81–82 (C.A.A.F. 2012); United States v. Harcrow, 66 M.J. 154, 160 (C.A.A.F. 2008); United States v. Baldwin, 54 M.J. 464, 465–66 (C.A.A.F. 2001); United States v. Cottrill, 45 M.J. 485, 489 (C.A.A.F. 1997). The limitation of corroborating a statement by corroborating facts in the statement is likely the result of the requirement in the text of the rule that the essential facts be corroborated. 2012 MCM, *supra* note 6, at MIL. R. EVID. 304(g).

125. The dissent in *Adams* states that military courts prior to *Adams* have "heretofore applied a purpose-based reading of the rule that tests for trustworthiness." United States v. Adams, 74 M.J. 137, 143 (C.A.A.F. 2015) (Baker, C.J., dissenting). The majority in *Adams* rejected the purpose-based reading of MRE 304(c) in favor of plain meaning and stated that the text of the old MRE 304(c) "expressly rejects the concept of extrapolating 'trustworthiness.'"

2. What Relationship Must the Corroborating Evidence Have with the Statement?

The text of the new MRE 304(c) does not limit what facts in a statement may be corroborated in order to corroborate the statement as a whole.[126] Under the old corroboration rule, the essential facts had to be corroborated.[127] The new MRE 304(c), however, allows corroboration of a statement by introducing independent evidence that corroborates any facts in the statement, essential or non-essential.[128] This means that the text of the new rule appears to allow for a statement to be corroborated by corroborating facts in the statement that are wholly unrelated to the criminal conduct at issue in the case.[129]

That being said, federal practice does not allow a statement to be corroborated by corroborating unrelated facts in the statement; it requires a nexus between the facts being corroborated and the charged criminal conduct.[130] Although federal courts agree that there must be a nexus between the corroborating evidence and the facts admitted, they disagree regarding how close the relationship must be between the facts in the statement being corroborated and the criminal conduct at issue in the case.[131] Some courts require that the facts being corroborated relate to the

---

Id. at 140 n.7. Unlike extrapolating trustworthiness, using context to corroborate a statement is not expressly rejected by the text of the rule. That being said, a plain meaning-based reading of the rule is still unlikely to allow context as part of the corroboration analysis, but a purpose-based reading of the rule would be more likely to allow consideration of the context in which the statement was made to be considered.

126. 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c).

127. *See* 2012 MCM SUPPLEMENT, *supra* note 52, at MIL. R. EVID. 304(c).

128. 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c).

129. *See id.*

130. *See, e.g.*, United States v. Stephens, 482 F.3d 669, 673 (4th Cir. 2007) (requiring that the corroboration relate to the criminal conduct at issue in the case); United States v. Deville, 278 F.3d 500, 507 (5th Cir. 2002) ("The evidence corroborating a confession must tend to connect the accused with the crime.") (quoting United States v. Abigando, 439 F.2d 827, 832 (5th Cir. 1971); United States v. Jones, 232 F. Supp. 2d 618, 622 (E.D. Va. 2002) (rejecting the argument that a statement as a whole can be corroborated by corroborating peripheral facts in the statement and instead requiring "some nexus between" the corroborating evidence and the essential facts); United States v. Calhoun, No. 92-2011, 1993 WL 280324, at *3 (6th Cir. July 26, 1993) (stating that corroboration of some crimes admitted to in a confession does not permit "the use of the confession to prove an uncorroborated crime"); United States v. Todd, 657 F.2d 212, 216 (8th Cir. 1981) (requiring that each crime be individually corroborated even where they are related).

131. *Compare Deville*, 278 F.3d at 507 (finding that corroboration of one crime corroborates a related crime because the crimes are intertwined), *with Todd*, 657 F.2d at 216–17 (finding corroboration of one crime does not corroborate two other crimes that are related to the corroborated crime).

general circumstances surrounding the criminal conduct.[132] For those courts, corroborating some of the crimes admitted to in the defendant's statement or corroborating the general circumstances surrounding the crimes admitted to is sufficient. For example, if Doe confesses to knocking Roe out by punching him in the face and stealing five dollars from Roe's wallet while at Roe's house, the confession to stealing five dollars from Roe could be corroborated by Roe saying Doe punched him, Roe's black eye, and an eyewitness seeing Doe's car parked outside Roe's house—even if Roe was not sure how much money was in his wallet or if any money was taken from him. However, other courts require that each crime charged must be individually corroborated.[133] For these courts, corroboration of one crime admitted to in a statement does not corroborate other crimes admitted to in the same statement which are not themselves corroborated. In the previous example, Doe's confession to stealing five dollars would not be admissible in these courts.

Military cases prior to *Adams* generally required the facts being corroborated relate to the criminal conduct.[134] However, they generally did not require independent evidence of each crime charged, but just of the general circumstances of the criminal conduct.[135]

---

132. *See, e.g.*, United States v. Brown, 617 F.3d 857, 863–64 (6th Cir. 2010) (finding that corroboration of a confession to burglary also corroborates the part of the confession to possessing a firearm); United States v. Sterling, 555 F.3d 452, 456–57 (5th Cir. 2009) (finding that the statement as a whole was corroborated and admissible despite parts of the statement not being otherwise corroborated). For example, in those courts, if the accused admits to robbing and murdering a person, corroboration of the murder can corroborate the larceny without independent evidence of the larceny because the two crimes are related. *See* North Carolina v. Parker, 337 S.E.2d 487, 496–97 (N.C. 1985) (holding that a confession to robbery in the course of a murder could be corroborated solely by evidence of the murder).

133. *See, e.g.*, *Stephens*, 482 F.3d at 673; *Calhoun*, 1993 WL 280324, at *3. For example, if the accused admits to robbing and murdering a person and there is corroboration of the murder but not of the larceny, the accused's confession to murder would be adequately corroborated and those parts of the statement would be admissible, but the statements confessing to larceny would not be admissible because there is no corroboration of the larceny even though they are part of one course of conduct. *See Todd*, 657 F.2d at 216–18 (finding a confession to murder adequately corroborated but not the conspiracy to commit it or the related conspiracy to rob the murder victim).

134. *See, e.g.*, United States v. Seay, 60 M.J. 73, 80 (C.A.A.F. 2004) (finding a confession to robbery in the course of a murder adequately corroborated by corroboration of the murder and the body being found without a wallet).

135. *See id.* at 78, 80 (finding a confession to larceny of a wallet adequately corroborated because accused also admitted to murdering the person as part of the larceny and the murder was adequately corroborated); United States v. Grant, 56 M.J. 410, 417 (C.A.A.F. 2002) (finding a confession to drug use corroborated by another confession to drug use several weeks later which was corroborated by a drug screening test). *But see* United States v. Rounds, 30 M.J. 76, 77–78 (C.A.A.F. 1990) (finding that corroboration of the use of one drug did not corroborate use of another drug at the same time).

Although there is no explicit nexus requirement in the text of the new MRE 304(c), in practice some degree of nexus will likely be required. What constitutes sufficient corroborating evidence in a particular case is an inherently fact-specific inquiry.[136] That being said, the facts being corroborated must still be sufficiently probative regarding the statement's reliability as a whole, such that they tend to make the statement itself trustworthy. To that end, corroboration of important, significant, or key facts in the statement are more probative as to whether the statement as a whole is reliable than corroboration of unimportant, ancillary, or insignificant facts.[137] This is because unimportant facts in the statement have little probative value at establishing the reliability of the statement as a whole.

Corroboration of the criminal conduct itself or of facts related to the charges in the case are more probative than corroboration of facts that are not criminal or which are wholly unrelated to the charges.[138] For example, if, in addition to confessing to punching and stealing from Roe, Doe also confesses to a driving while drunk three months earlier and says that his identity was stolen the previous year, corroboration of those incidents is much less probative regarding the reliability of Doe's confession to punching and stealing from Roe than the evidence corroborating the punch.

In short, the facts in a statement whose corroboration would be probative with regard to the reliability of the statement as a whole are likely to be the same facts that qualified as essential facts under the old corroboration rule. This is because those are the facts that are sufficiently significant within the context of the statement so as to make the statement as a whole reliable. So, the text of the rule allows for corroboration of a statement by corroborating any facts in the statement. However, in most cases, the only facts whose corroboration is likely to meet the burden regarding the reliability of the statement are the facts which would have been deemed to be essential facts in the statement under the old rule.

---

136. *See* United States v. Kirk, 528 F.3d 1102, 1112 (8th Cir. 2008).

137. *See* United States v. Dalhouse, 534 F.3d 803, 806 (7th Cir. 2008) (stating that corroboration is usually done by showing that "a few of [the] key assertions" in the statement are true); United States v. Jones, 232 F. Supp. 2d 618, 622 (E.D. Va. 2002) ("[T]he essential facts admitted, not peripheral facts unrelated to the crime in prosecution [must be corroborated]."); *Parker*, 337 S.E.2d at 495 (stating that corroboration of insignificant facts is insufficient).

138. For example, in a written statement to law enforcement, corroboration that the accused is seventy-one inches tall, as the accused claims in his statement, is less probative as to the reliability of his statement as a whole than corroboration that the accused was present at the location where he said he committed the crime.

3. How Much Evidence is Needed to Corroborate a Statement?

The quantum of evidence needed to corroborate a confession or admission remains largely unchanged.[139] The new rule states that the corroborating evidence "need raise only an inference of the truth of the admission or confession."[140] The independent evidence does not have to prove the crime beyond a reasonable doubt or even by a preponderance of the evidence.[141] Although *Opper* required "*substantial* independent evidence,"[142] the old MRE 304(c) did not incorporate the word substantial and required only independent evidence.[143] As a result, military case law required that the amount of independent evidence needed to only be "slight"[144] or even "very slight."[145] The new MRE 304(c) similarly omits the word substantial and requires only independent evidence.[146]

Although the quantum of evidence remains unchanged, the new standard itself, "*tend to establish* the trustworthiness," is also a statement regarding the amount of evidence needed.[147] The corroborating evidence must both raise an inference of the truth of the statement and tend to establish the trustworthiness of it.[148] Despite this additional requirement, tending to establish trustworthiness is also a low standard.[149] The evidence does not have to actually establish the trustworthiness of the statement, but only tend to do so.[150] Corroboration does not have to verify facts contained in an accused's statement, it only has to be consistent with them.[151] Because "tend to establish" and "raise an inference" are both low

139. *Compare* 2012 MCM SUPPLEMENT, *supra* note 52, at MIL. R. EVID. 304(c)(4), *and* 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c)(4), *with* 2012 MCM, *supra* note 6, at MIL. R. EVID. 304(g) (repealed 2014).

140. 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c)(4).

141. *Id.*; United States v. Cottrill, 45 M.J. 485, 489 (C.A.A.F. 1997) (citing United States v. Maio, 34 M.J. 215, 218 n.1 (C.M.A. 1992)).

142. Opper v. United States, 348 U.S. 84, 93 (1954) (emphasis added).

143. *See* 2012 MCM SUPPLEMENT, *supra* note 52, at MIL. R. EVID. 304(c); United States v. Adams, 74 M.J. 137, 140 (C.A.A.F. 2015).

144. *Adams*, 74 M.J. at 140 (citations omitted); United States v. Yeoman, 25 M.J. 1, 4 (C.M.A. 1987) (citations omitted).

145. United States v. Melvin, 26 M.J. 145, 146 (C.M.A. 1988) (citations omitted).

146. *See* 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c)(1).

147. *Id.* (emphasis added).

148. *See id.* at 304(1)–(2).

149. *See* United States v. Abu Ali, 528 F.3d 210, 237 (4th Cir. 2008). "[E]xtrinsic proof [i]s sufficient which merely fortifies the truth of the confession[s], without independently establishing the crime charged." *Id.* (alterations in original) (quoting Wong Sun v. United States, 371 U.S. 471, 489 (1963)).

150. *See id.*

151. *See* United States v. Corona-Garcia, 210 F.3d 973, 979 (9th Cir. 2000) (stating that corroborating evidence is evidence which "fortifies, augments, or supports" the confession or admission).

burdens, it is unlikely that the standard has changed in a practical sense, and prior military case law regarding the amount of evidence needed likely remains applicable.

B. *The Return of Essential Facts*

Although attempting to analyze the meaning of the new MRE 304(c) provides few definite answers, the analysis here cautions against interpreting the changes broadly. The ultimate object of corroboration has changed from picking out what facts are important enough to be deemed essential and then corroborating each of those essential facts in the statement for that part of the statement to be admissible, to corroborating facts in the statement as a means of corroborating the statement itself. One-for-one corroboration of each essential fact is gone, in favor of a tipping point where, once there is sufficient independent evidence which tends to make the statement itself trustworthy, the entire statement is admissible. Where that tipping point is located is dependent on the circumstances of the individual case as well as the quality and quantity of the corroborating evidence.

While the rule allows for the corroboration of any fact in the statement, the requirement that the facts being corroborated are probative with regard to the reliability of the statement as a whole limits the number of facts that are significant within the context of the statement. If the facts being corroborated are insignificant, those facts are unlikely to be sufficiently probative when establishing the trustworthiness of the statement. This amounts to a de facto return to picking out and corroborating the essential facts in the statement. However, rather than corroborating every essential fact as required by the text of the old rule and *Adams*, the text of the new MRE 304(c) codifies a version of the prior purpose-based reading of the rule like the one used by military courts prior to *Adams* and, to some degree, allows for the corroborating evidence to "bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[152]

V. CONGRESSIONAL INTENT AND THE FINAL ANALYSIS

After the C.A.A.F.'s holding in *Adams*, MRE 304(c) was quickly amended in response. Congress clearly expressed its intent for how the rule should be amended—"to conform to the rules governing the admissibility of the corroboration of admissions and confessions in the

152. Smith v. United States, 348 U.S. 147, 156 (1954).

trial of criminal cases in the United States district courts."[153] However, because the corroboration rule is not a monolith and there are significant variations in the rule within federal practice, this intent to follow federal practice is itself ambiguous—which formulation of the rule should be used? Was the intent to go as far as possible and adopt the most permissive version of the corroboration rule, or was it to simply do as little as possible to merely overturn the requirement of one-for-one essential fact corroboration? Because of the ambiguity, and because there are so many variations on the corroboration rule in federal courts, it is not possible to know whether the rule actually goes as far as Congress intended. In many respects, the text of the rule does not clearly articulate what methods of corroboration it embraces. It will thus be for the courts to decide how far the new corroboration rule goes.

Despite questions regarding the text of the rule and the intent behind it, the rule must still be interpreted. Although the rule now allows for corroboration of a statement by corroborating any facts in the statement, practically speaking, the only facts for which corroboration would be probative for meeting the new standard of tending to establish the trustworthiness of the statement are likely to be the essential facts contained in the statement. In practice, therefore, the new MRE 304(c) does nothing more than was necessary to overrule the requirement in *Adams* and under the text of the old rule that each essential fact be individually corroborated. Rather than requiring that every essential fact be corroborated and excising those that are not from the statement, once sufficient essential facts are corroborated, the statement as a whole is admissible. Thus, the new MRE 304(c) is just a repackaged version of the old, purpose-based, corroboration rule followed by military courts prior to *Adams* of corroborating some essential facts in the statement as a means of making the statement as a whole trustworthy and admissible.

CONCLUSION

Despite being a "dusty doctrine of criminal law,"[154] military courts and Congress have blown the dust off of the corroboration rule in the past few years. Like the old version of the rule, the new version is similarly easy to superficially understand and difficult to apply, especially in close cases. There is bound to be significant litigation over this rule in the future as military courts struggle to interpret and apply the new rule much as they struggled to interpret and apply the old formulation of the rule for the previous fifty years. Ultimately, it will be up to the courts to face the

153. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820 (2015).

154. United States v. Brown, 617 F.3d 857, 860 (6th Cir. 2010).

ambiguity in the rule and in the intent behind it, and to determine how broadly or narrowly to read it.

APPENDIX A: MRE 304(G) (MRE 304(C) PRIOR TO MAY 20, 2016)[155]

1. Rule 304(g)

(g) *Corroboration*. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) *Quantum of evidence needed*. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) *Procedure*. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

155. 2012 MCM, *supra* note 6.

APPENDIX B: MRE 304(C), AS AMENDED MAY 20, 2016[156]

1. Rule 304(c)

(c) *Corroboration of a Confession or Admission*.

(1) An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession.

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of the admission or confession, then it may be considered as evidence against the accused. Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.

(3) Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(4) *Quantum of Evidence Needed*. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the admission or confession. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(5) *Procedure*. The military judge alone is to determine when adequate evidence of corroboration has been received. Corroborating evidence must be introduced before the admission or confession is introduced unless the military judge allows submission of such evidence subject to later corroboration.

2. Analysis of MRE 304.[157]

156. 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c).

157. *Id.* app. A22-10 to -12.

2016 Amendment: This change brings military practice in line with federal practice.[158]

158. *See* Smith v. United States, 348 U.S. 147, 151–57 (1954); Opper v. United States, 348 U.S. 84, 93–95 (1954).

APPENDIX C: MRE 304(C) LINE-IN/LINE-OUT

1. MRE 304(c) with amendments promulgated by the President on May 20, 2016.[159]
2. Omitted language is shown as ~~stricken~~.
3. New language is shown as *italicized*.
4. Text:

(c) *Corroboration of a Confession or Admission.*

(1) An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been ~~introduced~~ *admitted into* evidence that *would tend to establish the trustworthiness of the admission or confession* ~~corroborates the essential facts admitted to justify sufficiently an inference of their truth~~.

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth *of the admission or confession, then it may be considered as evidence against the accused* ~~of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence~~. *Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.*

(3) Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(4) *Quantum of Evidence Needed*. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the *admission or confession* ~~essential facts admitted~~. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

159. *See* Order 13,730, *supra* note 1. *Compare* 2016 MCM, *supra* note 75, at MIL. R. EVID. 304(c), *with* 2012 MCM, *supra* note 6.

(5) *Procedure*. The military judge alone *is to* ~~shall~~ determine when adequate evidence of corroboration has been received. Corroborating evidence *must be* ~~usually is to be~~ introduced before the admission or confession is introduced *unless* ~~but~~ the military judge *allows submission of such* ~~may admit~~ evidence subject to later corroboration.